United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1818

United States Court of Appeals

For the Second Circuit.

B 0/5

DAVID LANE and MARY ANN LANE,
Plaintiffs-Appellants,

against

GENERAL MOTORS CORPORATION, A. B. CHANCE CO. and PITMAN MANUFACTURING CO., a division thereof (herein referred to as "Pitman"), and GOODYEAR TIRE & RUBBER COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

Volume III—Pages 845a to 869a.

MORRIS HIRSCHHORN,
By FINK, WEINBERGER, MEYER & CHARNEY, P. C.,
Attorneys for Plaintiffs-Appellants,
551 Fifth Avenue,
New York, N. Y. 10017
(212) 682-0546.

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendant-Appellee,
General Motors Corporation,
One Battery Park Plaza,
New York, N. Y. 10004
(212) 483-9000.

EMILE Z. BERMAN AND A. HAROLD FROST,
Attorneys for Defendants-Appellees, A. B. Chance Co. and Pitman Manufacturing Co., a division thereof,
77 Water Street,
New York, N. Y. 10005
(212) 344-4340.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

(5264)

UNITED STATES COURT OF APPEALS
FILED
JAN 7 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX.

TESTIMONY.

WITNESSES FOR PLAINTIFFS:

WITNESSES FOR DEFENDANT GENERAL MOTORS:

AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF NEW TRIAL.

* * *

A review of the facts in this case reveals that the involved truck on February 4, 1971, was proceeding at a lawful rate of speed (20 to 25 miles per hour) upon a highway covered with some snow and ice and when the driver braked for a change of light, the truck skidded out of control, struck a center island curb (approximately 9" high), jumped it, the cab chassis door next to the plaintiff passenger (David Lane) popped open and thereafter the truck started to and did roll over and the plaintiff was partially ejected, thereby sustaining serious and permanent crippling injuries.

The written question to the Court by the jurors, at the end of the trial (Court Exhibit 2), will be shown to be ambiguous, basically misconceived and mistaken not only on the law as given in the Court's charge through its instructions, but upon the facts as well. The question read as follows:

> "Did anyone testify why safety non burst locks were not used on trucks in 1967 (June 2)?"

The answer in response was that no one testified 'why' said locks were not used and it thereafter became obvious by the jury's verdict, that the burden of furnishing such an explanation must have been placed upon the shoulders of plaintiff, David Lane.

How would the plaintiff know the internal affairs of General Motors, as to why it did not install non burst locks in 1967, whereas probative testimony revealed auto manufacturers had already installed them in passenger cars and they had been in use

for some years prior to that time? The only one who would know that answer was General Motors itself and it did not furnish any explanation whatsoever! If it was anyone's burden to explain the 'why', it was defendant General Motors, not the plaintiff and we now can see how the jury went off on a tangential matter, misapplying, misconstruing and mistaking the meaning and intent of the Court's charge, to the adverse interest of the plaintiffs.

In this respect, it is to be recalled that there was uncontradicted testimony that safety non burst locks were in fact used before 1967 on competitors' trucks and yet the jurors asked whether there was any testimony 'why' they were not used in 1967 trucks (not restricting their inquiry to General Motors). The question is ambiguous and mistaken on its face. One can see at P. 972 of the trial record the basic error the jury was making when reference was made to a 1963 Dodge truck and that Chrysler products definitely had the safety non burst lock installed on their trucks. As one of plaintiff's expert witnesses stated in that regard:

> "I have a 1962 Ford, Ford 250 (truck) and it has anti burst lock in it ... The Chrysler product had a 1963 Dodge truck...that vehicle also had an anti burst latch...but 1963 Chrysler products definitely had it."

AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF NEW TRIAL

If that portion of the testimony were not so, and in fact if General Motors had not used the safety non burst lock in any of its trucks, let alone its passenger cars prior to 1967, General Motors would have made absolutely sure to have presented testimony to that effect in the defendant's case, which it did not do.

In addition, General Motors own engineer indicated that safety non burst locks were used on General Motors passenger cars prior to 1965, but didn't know about trucks.

Therefore, how could the jurors have logically asked 'why' these locks were not used, when there was testimony in fact that they were used previously in the 'state of the art', unless they were seriously confused and in error on the evidence?

With further reference to the jury's note (Court Exhibit 2), the jurors may have then decided mistakenly that their duty was to solve whether the trucking industry had used safety non burst locks in 1967 and decided plaintiff did not prove it. This was material error reflecting how the jury had been led astray because there was testimony in the trial record that competitors trucks (Ford and Chrysler) had these safety locks and even if they didn't, forgot to apply and in any case failed to apply the Court's instructions and comments which equated safety locks for trucks and passenger cars (see P. 681 of trial record) and concededly General Motors passenger cars had safety non-burst locks installed since 1965 (P. 1512 of trial record).

AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF NEW TRIAL

Further, if the jury by its written question was referring solely to General Motors trucks, that too is erroneous and misdirected because it is not an industry or corporation that can set its st[illegible]ndards, or custom and practice when challenged in litigation, but a Court and jury.

Another resonable interpretation of the jury question and answer 'No', is that safety non burst locks were not used at all by the trucking industry in 1967 as the 'state of the art', an incorrect conclusion misleading the jurors on the law to be applied to the facts. Finally, was not the written jury note, ambiguous on its face, somehow connected to the subsequent oral question of the jury, as stated by the forelady after receiving the answer to its written question dealing with safety non burst locks? The inquiry was:

> "Your Honor, I wonder if we could speak with you privately about something we are trying to interpret, something you said and it may bring the whole thing to a conclusion..."

But, the jurors never propounded their question to the Court, so as to properly interpret that which was confusing them, after the Court requested that they write down their problem-s on interpretation since a Court cannot see a jury in private and this instruction the jurors failed to follow also.

Taken together, both acts of inquiry by the jury reflect basic mistake, misconception and error on their part, in substance and procedure and their disregarding the probative evidence to

come to a verdict without valid legal support, now calls for that verdict to be set aside.

How do we know whether the Court's answer and explanation to the jury's question-s, might not have resolved the case adverse to either of the defendants?

In connection with the door lock issue, the Court itself made a comment which is found at P. 581 of the trial record, when defendant General Motors' counsel was conducting a voir dire on the subject of the testimony of one of plaintiff's experts dealing with door locks:

> The Court: ..."He will testify that there were trucks that had this design which apparently General Motors put on later..."

and referring to the safety non burst lock, the Court continued,

> "...that it could have been used on a car, passenger car, it (safety non burst lock) could just as well have been used on a truck..."

Again, the jury's note to the Court (Court Exhibit 2) may be construed, over and above the 'why' aspect, under the plain meaning of its words, at least to show that the jurors accepted the safety non burst lock as the one that should have been used by General Motors to avoid plaintiff's injuries and yet because no one explained 'why' this lock was not used on trucks in 1967, the obvious conclusion by the verdict was that plaintiff did not sustain his burden of proof.

AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF NEW TRIAL

After all, plaintiff's expert testified without contradiction on the safety non burst lock at P. 690 of the trial record as follows:

> "...it is my opinion that with this type of door lock, or any door lock that completely encapsulates the striker plate, the door would not have come open as described."

> "No matter what happened to the rest of the door frame in this type of latch, it remains together. Any distortion, as seen in the other model, of the door or latch will open it very readily."

Stated another way, the jury may have accepted that portion of the plaintiffs' case that produced evidence to show if the safety non burst lock had been used, the plaintiff would not have received the spinal cord injuries he did, because the door would not have popped open! Therefore, did not the jury reject the testimony of defendant General Motors' experts who concluded that any door latch would have opened under the circumstances of this case, particularly because General Motors conducted no tests on safety non burst locks to prove that this type of latch would give way, yet conducted extensive tests on a dissimilar chassis through its independent expert? And, would it not be material error for a jury to rely upon the opinion of an expert who had no

experience nor did any tests on the safety non burst lock, if it did so rely thereon, to justify the witness' conclusory opinion that any lock would have opened under facts and circumstances of this case.

To quote one of plaintiffs' experts, at P. 676 of the trial record, when he was asked to explain the design defect in the door locking mechanism involved in this case, he answered:

> "The major defect as I see it, is that it separated the devices which were intended to keep the door latch engaged."

And, at P. 677 he stated:

> "...the latch should have encapsulated completely the striker so that it could not come apart without rendering the metal parts."

To summarize at this point, there was probative testimony to the effect that if a safety non burst lock had been used on the involved truck, the door would not have opened, plaintiff would not have been partially ejected and he would not have received his paralyzing injuries. But, with the lock that was furnished which was of a non safety, non burst type and without adequate and proper longitudinal restraints, the lock could and did come apart, at a time when the 'state of the art' definitely included the availability of safety non burst locks in General Motors passenger cars and in competitors' trucks as well. Even General

Motors own engineer admitted at P. 1529 of the trial record, that the closer the vertical restrains to the integrated unit, the better the design and conversely, the further away the worse. To quote:

> Q. "And one reason it is better to make them as close as possible to where the latch is, in geographical proximity, is to make it sort of an integrated system, is it not?"
>
> A. "Correct."

In this regard, it cannot be denied that the safety non burst lock is indeed a form or piece of safety equipment, as is a safety belt for an occupant in a vehicle and whereas General Motors raised and prevailed upon the Court to send to the jury the issue of plaintiff's failure to wear the safety belt, to either negate their damages or act in mitigation thereof, they did not see any need or duty to install a safety non burst lock, although it was available and could have been used to obviate this accident.

It is a major fact that General Motors offered no testimony or proof whatsoever, to show that a safety non burst lock would have opened up, irrespective of the so-called kinetic energy factor, under the facts of this case, other than opinion based upon speculation and surmise (i.e. no tests performed, no field reports, no surveys were done and no statistics available).

* * *

AFFIDAVIT OF ROY L. REARDON IN OPPOSITION TO MOTION FOR NEW TRIAL.

* * *

Testimony of Jersey Central Personnel

9. There were six occupants in the vehicle at the time of the accident, three in the cab, including Lane, and three in the man cab which was affixed to the chassis immediately to the rear of the driver's cab. All had previously ridden in the vehicle and all testified as to its alleged instability, particularly in off-the-road use. Lane testified that the vehicle swayed on a very windy day (897); Mr. Baugher testified that the vehicle was cumbersome when it transversed a hole in off-the-road use (463); Mr. Burlew testified that the vehicle swayed while going over a rough area (191); Mr. Greene testified that the vehicle rocked when it went over curbs (387); Mr. Nichols testified that the vehicle rocked when it transversed a small hole while on an upgrade in off-the-road use (479). In contrast to these specific instances of reported instability - instances which reason dictates would ordinarily subject vehicle occupants to a swaying or rocking sensation - Mr. Leighton testified that the truck would "lean on curves"* and "sway quite a bit" during off-the-road use (404). Mr. Conroy, not an occupant, also testified that the vehicle was unstable and top-heavy (495). The jury could have quite reasonably found that the clear

---

* Mr. Lane also testified at a deposition upon oral examination that the vehicle leaned on curves (2135).

weight of the evidence was that the truck was not top-heavy or unstable in on-the-road situations and that off-the-road use produced a rougher side. It is significant that the testimony of five of seven of the above referred to specific situations of "instability" that related to off-the-road use. Had these men experienced specific instances of on-the-road instability, it is more than reasonable to infer that the men would have so testified. It is also reasonable to conclude that these men would have initiated a written complaint had they been of the view that the vehicle was not safe. This they did not do.

10. It is difficult to assess the factors that played a role in the jury's assessment of the credibility of the above witnesses. Certain factors are apparent, however. Mr. Lane obviously had an interest adverse to General Motors. Mr. Burlew obviously had interests adverse to General Motors: one, a fear of losing his job - a fear going back to February 4, 1970 which he expressed at the accident scene (304); two, an interest in removing whatever blanket of guilt for Mr. Lane's injuries that may have burdened him. More evident that the above is the impeachment of Mr. Burlew's testimony. He testified that he was the driver assigned to the truck for six or eight days and had driven the vehicle on and off the road (189). No one in the crew had even seen him drive the vehicle on the road

before (391) (Greene); (412) (Leighton); (465) (Baugher); (1294) (Lane). Only Mr. Nichols had seen Mr. Burlew drive the vehicle off the road, and then only for a distance of 50 to 100 feet (481). Only Mr. Conroy, the man responsible for putting Mr. Burlew in the driver's seat, saw him drive on the road, and, then only for short distances (501). Mr. Conroy's credibility was certainly at issue - his interests paralleled Mr. Burlew's in one significant respect - responsibility for Mr. Lane's injuries. It was Mr. Conroy who put Mr. Burlew behind that wheel because of a union rule (503).* The credibility of the crew would also quite naturally be affected by their affinity with their fellow worker, Mr. Lane. Based upon all of these factors the jury could reasonably conclude that the vehicle had no history of serious instability.

Testimony of Derwyn Severy

11. Mr. Severy, an expert called on plaintiffs' behalf who had experience in collision research, testified that there were two reasons for the loss of control and roll over. One, he claimed that the width of the rear axle from outside tire to outside tire was narrower than the corresponding width of the front axle thereby decreasing

---

* Leighton, the shop steward, testified that there was no union rule requiring the junior man to drive (2182).

stability. Two, he claimed that the mounting of the Pitman boom aft of the rear axle was improper because it not only raised the vehicle's center of gravity enhancing the possibility of a tip over but also was an improper distribution of the weight of the boom on the truck (1094). Mr. Severy's opinions were subject to a strong attack on cross-examination and by way of direct evidence on the defendants' cases especially in the form of the testimony of Jack E. Stilwell and James Stannard Baker discussed below. In any event, the clear weight of the evidence established that General Motors or Hendrickson bore no direct responsibility for the rear axle width, the placement of the boom or the center of gravity complained of.

Testimony of Jack E. Stilwell

12. Mr. Stilwell testified as an expert and employee of Pitman. It was his opinion that it took approximately the same force to unseat a 10.00 x 20.00 tire which was original equipment on the vehicle when it left General Motors and a flotation tire (1931). Mr. Stilwell also testified that the center of gravity of the vehicle was not too high (1962), and that the weight distribution was within the recommended usage (1956). Mr. Stilwell's general opinion was that the vehicle was not unstable and, unlike Mr. Severy, Mr. Stilwell based his opinion on mathematical calculations. His qualifications and the precise basis for his opinions

were factors that the jury could have considered in evaluating his respective testimony vis-a-vis that of Mr. Severy.

Testimony of James Stannard Baker

13. Mr. Baker also testified as an expert for Pitman. He was uniquely well qualified to testify as an accident reconstruction expert. He testified that the accident was not caused by use of the flotation tires, or the alleged high center of gravity of the vehicle, or the narrower tread of the rear axle. It was his opinion that the accident was caused by an application of the brakes which caused the rear wheels to lock but not the front wheels. Under the snow and ice conditions present at the accident scene, the combination of circumstances caused the vehicle to go into an uncontrollable counterclockwise yaw. He further testified that any vehicle hitting the median curb with the forces present in this accident, namely, a 28,000 pound vehicle travelling 25 m.p.h. generating 580,000 foot pounds of force, would have rolled over upon impact with the curb. Mr. Baker, unlike Mr. Severy, supported his opinion with calculations and diagrams. With the use of models of the truck and the roadway, he was able to reconstruct and visually demonstrate his opinion of the precise operational mode of the truck from the time the brakes were applied up to the roll over. Mr. Baker's testimony clearly provided the jury with an evidentiary basis

for concluding that plaintiffs' claim of instability was invalid.

The Flotation Tires and Their Mounting

14. General Motors knew that Hendrickson was going to mount four flotation tires on the vehicle in place of the six 10.00 x 20.00 placed on the vehicle by General Motors. Mr. Severy testified that flotation tires were inferior to dual 10.00 x 20.00 tires, however, the clear weight of the evidence is to the contrary. Charles Small, chief engineer and long time employee of Hendrickson, testified that the use of such tires was common in the truck industry because Hendrickson, a reputable modifier of all makes of trucks, had done similar jobs many times (1604). Mr. Stilwell also testified that the flotation tires were adequate substitutes for 10.00 x 20.00 tires (1941) and Mr. Baker also testified that such tires were regularly used for off-the-road service (2117). It is also clear and reasonable to infer that the plaintiffs had no complaint against the flotation tires since they discontinued the action against Goodyear Tire and Rubber Company. From the above, the jury could have found that flotation tires were equivalent to 10.00 x 20.00 tires insofar as the stability and "tipability" of the vehicle were concerned.

AFFIDAVIT OF ROY L. REARDON IN OPPOSITION TO MOTION FOR NEW TRIAL

15. The evidence as reflected in the testimony of Mr. Small, Hendrickson's documents and Pitman's documents also established that the rear tread of the vehicle was wider than the front when the vehicle was received by Pitman. Mr. Small testified that it is the practice of Hendrickson to mount the rear wheels to track as closely as possible the track of the front wheels (1585). To support the fact that this practice was followed here, Mr. Small identified a sketch showing the width of the front tread to be 94 3/8 inches (1585) and the Pitman receiving order established that the rear axle tread was 95 1/2 inches when the vehicle was received by it (1103). This clearly demonstrates that there was almost perfect tracking of the front and rear wheels when the vehicle reached the hands of Pitman. Although pictures of the vehicle taken after the accident gave the appearance that the right rear wheels were located inboard of the 93 inch wide Pitman body (1590), the jury could clearly conclude on the evidence that such a condition was created after the truck left the control of Hendrickson and General Motors.

16. There was also some dispute as to whether or not the rear flotation tires could have been mounted in reverse. This is significant because the difference in the mode of mounting can vary the rear tread by eleven inches. Mr. Severy testified that he was not familiar with such rims (1179), and that a different wheel would have to be

used to effect such a change (1178, 1189). The plaintiffs produced two witnesses whose versions differed somewhat from Mr. Severy's. Mr. Reilly, a Jersey Central employee, and Mr. Cobb, a tire repairman, testified that different clamps were needed to mount the flotation tire in a reverse position (1917) (Reilly); (2202) (Cobb). Mr. Small and Mr. Stilwell disagreed with this testimony and testified that the rims were completely interchangeable (1860), (1873) (Small); (1928) (Stilwell). Mr. Lyons, an engineer from Firestone Tire and Rubber Company and an expert on tires and rims of all types, testified that the same clamps are used whether the tires and rims were reversed or not (2235). The weight of the evidence supported Mr. Lyons' testimony. Furthermore, there was not one iota of evidence to support the conclusion that the tires were mounted inboard or reversed at Hendrickson or General Motors.

The Mounting of the Boom

17. General Motors knew that the truck was going to be used for utility work and that Jersey Central was going to be the ultimate buyer. However, General Motors did not know that a boom was going to be mounted on the chassis nor was it advised of the placement of the boom. The testimony of Mr. Dietz, Mr. De Midowitz and Mr. Coons confirms this (139) (Dietz); (571-72) (De Midowitz); (1324)

(Coons). All that General Motors knew was that the vehicle was to have a gross vehicle weight of 30,000 to 32,000 pounds and would be used in on and off-the-road situations. The vehicle did have such a gross vehicle weight. Accordingly, the weight of the evidence establishes that General Motors bore no responsibility for the mounting of the boom.

* * *

REPLY AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF MOTION FOR NEW TRIAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAVID LANE and MARY ANN LANE, :

Plaintiffs, : PLAINTIFFS' REPLY AFFIDAVIT

- against - :

71 CIV 986 (E.W.)

GENERAL MOTORS CORPORATION, A.B. CHANCE CO. and PITMAN MANUFACTURING CO., a Division Thereof (Herein Referred to as Pitman) and GOODYEAR TIRE & RUBBER COMPANY, :

Defendants. :

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MORRIS HIRSCHHORN, being duly sworn, deposes and says:

That he is the attorney for plaintiffs and submits this affidavit in reply to defendants' answering affidavits.

Defendant General Motors' affidavit in opposition to setting aside the verdict under Rule 59 of the F.R.C.P., argues to overcome matters not being urged by plaintiffs and sidesteps the basic issue as to whether the jury was so confused as to require the granting of a new trial, in this case of undisputed facts.

This most important subject (i.e. jury confusion), omitted in General Motors' papers in its attempt to defeat this application, is reflected by the jurors' inquiry put to the Court just before the verdict was rendered, to wit:

REPLY AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF MOTION FOR NEW TRIAL

"Your Honor, I wonder if we could speak with you privately about something we are trying to interpret, something you said and it may bring the whole thing to a conclusion..." (underscoring ours),

and while the Court directed their request to be written down in the jury room, so as to be appropriately answered and/or supplemented by further instructions, the jurors failed to follow that directive and instead, made their own interpretation of the law.

Was the interpretation the jury needed, in their confusion to understand and properly apply the Court's charge and the law contained therein, on the subject of the safety non burst latch and/or the door popping open and both of these factors', relating to plaintiff's cause of action based on crashworthiness (i.e. enhanced injuries)? Did the jurors need help in properly and adequately differentiating between the law on design defect and crashworthiness, so that they could differentiate the two causes of action adequately and then comply with the law given to them in the charge? Would the interpretation that could have been furnished in response to their inquiry, but was never allowed to be answered by the jury, so able to influence the opinion of at least one or more of the jurors?

Furthermore, when it is recalled that the jury asked in a prior question in writing, which it did allow the Court to answer and which on its very face was a misconception, (i.e. "Did anyone testify why safety non burst locks were not used on trucks in

June (June 2, 1967)? Court Exhibit 2 - a matter not basic nor in issue), we can understand and more readily see that the jurors were basically misleading themselves as well as Court and counsel ultimately, to the prejudice of the plaintiffs. See BARNETT v. LOVE, 294 F.2d 585. [NOTE: By 'safety non burst lock' is meant the design and layout of the striker plate and locking mechanism which internally encapsulates one another and not necessarily a safety button on the door sill.]

Insofar as plaintiffs' theories of liability are concerned, General Motors either overlooks or is confused and mistaken about plaintiffs' cause of action based upon the 'second accident' or 'enhanced injuries' concept, otherwise known under strict liability law as the doctrine of crashworthiness. No recognition is shown about the laws of crashworthiness by General Motors in proper context, which deals with plaintiff Lane's enhanced injuries caused by the door popping open, since General Motors attempts to merge plaintiff's two causes of action into one cause of action, a total inaccuracy.

If in truth General Motors has difficulty in understanding the theories of liability involved in this case with such complicated issues, what can be said about the jury's misunderstanding and confusion?

Under the doctrine of crashworthiness, dealing with the defective design of the door locking system and its contributing to the 'second accident', so to speak, the issue is not what

caused the accident, but what caused the injuries. General Motors papers are only concerned about what caused the accident and so were the jurors in their confusion!

Now, replying specifically to defendant General Mootors' papers in opposition to setting aside the jurors' verdict, the following can be stated:

(a) General Motors' statement and argument in the memorandum of law that 11 days expired after the verdict was rendered at the conclusion of the trial, to indicate that plaintiffs violated some Rule, is erroneous. Rule 59 (b) of the F.R.C.P. expressly states that a motion for a new trial shall be served not later than ten (10) days after the entry of judgment and the judgment was entered on March 20, 1964, the motion papers were served and filed on March 29, 1964, in the ten days as prescribed by the Rules, the motion is timely and the statement by defendant General Motors is erroneous.

(b) General Motors argues against plaintiffs' portion of the motion dealing with Rule 50 of the F.R.C.P., which deponent withdrew some five (5) days or more before the General Motors affidavit was served and filed (i.e. General Motors attorney James Barrett was specifically so informed, as was one of the Court's law assistants, by telephone). Why do they discuss what is not in issue?

(c) In response to the repeated statements that the involved truck functioned without an accident on and off the road

for some 2-3/4 years preceding the day of the accident involved herein, if the verdict had been in favor of the plaintiff, defendant General Motors could not have soundly argued thereafter that three years of use without an accident (on the road or off the road), would make the involved door a good or sound door or that the mere passage of time cuts off the manufacturer's liability for a defectively designed product. See PRYOR v. LEE C. MOORE CORP., 262 F.2d 673 - 15 years safe use of an oil derrick did not foreclose suit for personal injuries against the manufacturer of the derrick; CITY OF BRADY, TEXAS v. FINKLEA, 400 F.2d 352 - 28 years safe use of transmission lines nevertheless presented a valid issue on those transmission lines when an accident occurred for the first time thereafter; INTERNATIONAL DERRICK & EQUIPMENT CO. v. CROIX, 241 F.2d 216 - seven years safe use of an oil derrick which was defective did not preclude a plaintiff's verdict; TUCKER v. UNIT CRANE & SHOVEL CORP., - nine years safe use of a boom on a crane did not preclude a plaintiff's verdict when the boom collapsed; FREDERICKS v. AMERICAN EXPORT LINES, 227 F.2d 450 - 2-1/2 years safe use of a skid iron support of a stevedore did not preclude a plaintiff's verdict when a defect caused an accident thereafter; HALE v. DEPAOLI, 201 P.2d 1 - 18 years safe use of a porch railing did not preclude a plaintiff's verdict when the railing was proved to be defective when it collapsed; MICKLE v. BLACKMON, 252 S.C. 202, 166 S.E. 2d 173, (prominent products liability case) wherein defective design and mispositioned selector knob having 13 years safe use didn't prevent verdict for plaintiff from being sustained upon appeal in a vehicular accident case.

REPLY AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF MOTION FOR NEW TRIAL

(d) Defendant General Motors complete discussion dealing with the involved door popping open, permitting plaintiff David Lane to be ejected, when the right rear tire struck the center island curb, is in contradiction to the evidence in this case because eyewitness Leighton at P. 398 of the trial record testified that "...the front of the truck jumped the curb on the median and the door came open, popped open..." and the plaintiff testified at P. 906 of the trial record "...we were going up over the divider, the door popped open...", both and/or either version indicating the door popped open before the right rear tire struck the island curb because after all, each one of the front tires struck the island curb and kinetic energy was released at the time, a very misleading and confusing subject of technicalities, which were not only over and above the heads of the jurors, but quite frankly, the attorneys as well. Stated another way, the testimony was and is that when the front tires of the involved truck hit the center island curb, at about and almost immediately thereafter, the door popped open, which was before the right rear tire hit the curb.

However, even if it is assumed arguendo that the door popped open at or about the time the right rear tire struck the center island curbing and substantial damage was done to General Motors' chassis, we still don't know whether that damage was inflicted when the truck completely rolled over and hit the ground. But, one thing we do know, is that the door improperly popped open when it should not have, at and about the time the front of the truck and its wheels struck the curb, the eyewitnesses confirm it and any

expert's opinion to the contrary have little or any wieght or probity on that subject, because it is just their guess as against what was seen and experienced by the men at the scene of the accident.

(e) When General Motors writes in opposition to this application that it was not responsible for the right rear axle and tire configuration depicted in various photographs admitted into evidence at the trial, it overlooks the fact that Hendrickson's acts and/or failures to act were found to be its responsibility as the law of the case, that photographs taken by defendant Pitman itself clearly shows that the rear tires on the truck delivered to plaintiff Lane's employer, Jersey Central Power & Light Co., were inboard and conceded as certainly wrong by General Motors own witness, Mr. Small, Chief Engineer for Hendrickson and if one picture can speak a thousand words, it has done so. (Plaintiffs' Exhibit 112 in Evidence.)

(f) General Motors characterization that its engineer Forrester (see page 19 of opposing counsel Reardon's affidavit), testified that in his opinion "...the door was caused to open by... the inadvertent action of an unbelted occupant as he was thrown about the cab..." If that is so, although all the testimony was to the contrary, such testimony invokes liability against defendant General Motors as well, because in an article written in the General Motors Engineering Journal, May-June 1954, Volume L, No. 6, authored by Mr. James Leslie of the Fisher Body Division of General Motors, a statement is made at P. 21, as follows:

REPLY AFFIDAVIT OF MORRIS HIRSCHHORN IN SUPPORT OF MOTION FOR NEW TRIAL

"The latch must be strong enough to withstand the weight of the occupants being thrown against the door."

Can one imagine the weight of one man being thrown against the door permitting such a design of door lock to open, as being a safe door lock, where the truck involved weighed some 30,000 pounds and cost approximately $35,000.00.

* * *

Services of three [3] copies of
the within
hereby admitted this 3rd day
of January, 1915 3:15 p.m.

General Motors
Attorney for
Simpson Thacher & Bartlett

Services of three [3] copies of
the within
hereby admitted this 3rd day
of January, 1915

Brown & Frost
Attorney for A.B. CHANCE & PITMAN